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No. 09-654

Supreme Court, U.S.
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In The
Supreme Court of the United States

ORTHO BIOTECH PRODUCTS, L.P.,

Petitioner,

v.

UNITED STATES EX REL. CHINYELU DUXBURY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether certiorari should be denied in this case under the False Claims Act, 31 U.S.C. §§3729-3733, alleging a nationwide Medicare fraud scheme:

A. Where the First Circuit ruling, that "the plain and unambiguous terms" of the "original source" exception, 31 U.S.C. §3730(e)(4)(B), to the "public disclosure bar," 31 U.S.C. §3730(e)(4)(A), require the relator to "provide[ ] the information to the Government *before filing an action*" and "does not impose any other timing requirement" that the information should have been provided "*before* the public disclosure," followed the clear dictates of *Rockwell International Corp. v. United States*, 549 U.S. 457 (2007) and, since *Rockwell*, no Circuit has held to the contrary; and,

B. Consistent with the precedent of the other Circuits, the First Circuit, after a detailed factual analysis, ruled that Relator satisfied the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure regarding allegations of fraud where Relator "alleged the submission of false claims across a large cross-section of providers that alleges the 'who, what, where, and when' of the allegedly false or fraudulent representation" which "supports a strong inference that such claims were also filed nationwide."

RESPONDENT PARTIES TO THE PROCEEDING

The district court in *U.S. ex rel. Duxbury v. Ortho Biotech Products, L.P.*, USDC DMa CA No. 03-12189-RWZ, by order dated December 10, 2009, substituted Relator Mark Eugene Duxbury's surviving spouse, Chinyelu Duxbury, as the Relator.

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INTRODUCTION

Ortho's Petition seeking certiorari of the First Circuit's decision in *U.S. ex rel. Duxbury v. Ortho Biotech Products, L.P.*, 579 F.3d 13 (1st Cir. 2009) should be denied. Ortho erroneously claims that the First Circuit took the wrong side of what Ortho misleadingly suggests is an ongoing conflict among the Circuits as to whether the "original source" exception, 31 U.S.C. §3730(e)(4)(B), to the "public disclosure bar," 31 U.S.C. §3730(e)(4)(A), means what it says when it explicitly requires, in cases where there has been a "public disclosure" of an alleged *qui tam* fraud, that the relator with "direct and independent knowledge" of the fraud provide their information to the government *"before filing an action."* Ortho wrongly argues it is necessary to read into the statute the additional requirement that the relator provide the information to the government *"prior to the public disclosure."* Contrary to Ortho's assertions, the First Circuit's ruling that a relator is required by the plain words of the statute to provide the information underlying its *qui tam* suit to the Government *"before filing an action"* and not, by any form of words, *"prior to any public disclosure,"* is completely consistent with this Court's decision in *Rockwell International Corp. v. United States*, 549 U.S. 457 (2007) that "disposition[s]" regarding the requirements of "original source" status "begin with subparagraph B standing on its own" and the statute explicitly requires relators to have "direct and independent knowledge" of the information underlying their complaint because

the statute requires the relator to provide the government the information "*before filing an action*" and that is "the information one would expect a relator to 'provide to the Government *before filing an action.*'" Ortho's assertions notwithstanding, while, prior to *Rockwell*, there may have been confusion by a minority of Circuits that it was appropriate to read into the statute the additional requirement that the information had to be provided to the Government "*prior to the public disclosure*" or shown that the relator "had a hand in the public disclosure," that is not the present situation. Since *Rockwell*, *no* Circuit, has actually based a decision on the proposition that §3730(e)(4)(B) imposes such an additional requirement. See Reasons For Denying The Writ, Section I.

In addition, Ortho misleadingly suggests to the Court that the First Circuit's ruling that Relator's complaint satisfied the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure was based on Relator "*not*" "identify[ing] a particular false or fraudulent claim," Pet. at 33, and therefore the First Circuit's ruling was in conflict with other Circuits requiring "some representative examples of false claims to support allegations of a wide-ranging fraud." Pet. at 26. On the contrary, as the First Circuit makes manifest, its ruling finding the Relator pleaded fraud with sufficient particularity was based on the court's detailed analysis of relator's allegations and the court's finding that: Relator "alleged facts that support[ed] his claim that [defendant] intended to cause the submission of false claims" and

"alleged facts that false claims were in fact filed by the medical providers he identified . . . [that] further support[ed] a strong inference that such claims were also filed nationwide." Pet. 37a. The First Circuit's ruling that Relator's detailed factual allegations that "false claims were in fact filed by the medical providers he identified" and that these particular instances of fraud "further support[ed] a strong inference that such claims were also filed nationwide" is the personification of the "representative example" rule adopted by other Circuits in cases involving a complex fraud scheme of long duration. As has been consistently held by other Circuits, Rule 9(b)'s particularity requirements are fulfilled where the Relator in such cases provides "representative examples of false claims" in order "to support allegations of a wide-ranging fraud." See Reasons For Denying The Writ, Section II.

In light of the First Circuit's following the clear dictates in *Rockwell* that the plain words of the statute govern the requirements for granting "original source" status, the fact that since *Rockwell* was decided there has not been an actual rejection by any of the Circuits of this proposition, and the First Circuit's well considered review of the Relator's detailed allegations of fraud that is completely consistent with the standards established by Rule 9(b) and the other Circuits, there is no demonstrated need for certiorari to be granted.

STATEMENT

This Petition arises out of the First Circuit's affirmance of the lower court's ruling that the plain words of the "original source" exception, 31 U.S.C. §3730(e)(4)(B), to the "public disclosure bar," 31 U.S.C. §3730(e)(4)(A),[1] explicitly require, in cases where there has been a "public disclosure" of an alleged *qui tam* fraud, that the relator with "direct and independent knowledge" of the fraud provide their information to the government *"before filing an action"* and does not also require that the information be provided *"prior to the public disclosure."* It also seeks review of the First Circuit's ruling that in a complex nationwide fraud scheme of long duration

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[1] 31 U.S.C. §3730(e)(4) provides:

[The "Public Disclosure Bar"]

(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

[The "Original Source" Exception]

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

involving the alleged submission of numerous false claims, the heightened particularity requirements of Rule 9(b)[2] are satisfied if the plaintiff alleges sufficient facts of the "who, what, where, and when" of the submission of a cross-section of claims or representative examples of such fraud that support "a strong inference that such claims were also filed nationwide."

As detailed in his Complaint, the Relator Duxbury was a sales representative for Ortho from 1992 to 1998 who was responsible for the promotion and sale in the Western United States of Ortho's blockbuster drug ProCrit approved by the FDA to treat anemia resulting from chemotherapy, chronic kidney disease, HIV infection, and blood loss from certain types of surgery. Pet. 5a. Relator alleged that, beginning in December, 1992 to the 2006 filing date of the amended complaint, Ortho engaged in a scheme to provide kickbacks to health care providers "to induce them to prescribe ProCrit." Pet. 11a. The kickbacks allegedly included "free ProCrit, off-invoice discounts and cash in the form of rebates, consulting fees, educational grants, payments to participate in studies or trials, and advisory board honoraria." Pet.

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[2] Rule 9(b) of the Federal Rules of Civil Procedure provides:

> **Fraud or Mistake; Conditions of Mind.** In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

11a. The Amended Complaint alleged that the kickbacks, among other things, "caused providers and hospitals to submit false claims for payment to Medicare for ProCrit." Pet. 11a. Relator alleged in his initial Complaint, as well as the amended complaint, that he had provided the information to the government prior to filing the suit. Pet. 61a, 30a.

Relator's original Complaint alleging the kickback scheme was filed subsequent to a master consolidated complaint (the "MCC") filed in September, 2002 in a multi-district litigation, *In Re Pharm. Indus. Average Wholesale Price Litig.*, MDL No. 1456, No. 01-12257-PBS (AWP MDL 2002), concerning the fraudulent reporting of the Average Wholesale Price (AWP) of drugs including Ortho's ProCrit. Pet. 6a. The MCC also alleged the use of illegal kickbacks. Pet. 12a. Relator did not allege that he had provided any information concerning his kickback claims to the government *prior to the public disclosure* of the kickback allegations in the MCC. Pet. 16a.

While Relator's case was pending, this Court issued its decision in *Rockwell International Corp. v. United States*, 549 U.S. 457 (2007). In *Rockwell*, this Court held that the "information" to which the "original source" exception, §3730(e)(4)(B), speaks is the information upon which the relators' complaint allegations are based and not the information underlying the "public disclosure." Id. at 470-471. This Court based its holding on the fact that "subparagraph (B) standing on its own suggests that disposition" since the statute's plain words require

that the information be provided to the government "*before filing an action*" and that the "information one would expect a relator to 'provide to the Government *before filing an action* . . . based on the information' is the information underlying the relator's claims." Id. at 471.

Subsequent to *Rockwell* the district court in *Duxbury* dealt with Ortho's motion to dismiss on the basis of the "public disclosure bar" and that Duxbury did not qualify as an original source for the kickback scheme because, among other things, Duxbury did not provide the government with the information underlying its complaint prior to the filing of the 2002 MCC in the AWP MDL litigation. Pet. 60a. Ortho also based its motion to dismiss on the assertion that Duxbury's claims were "deficient under Rule 9(b)." Pet. 72a.

The district court found that, although the MCC constituted a "public disclosure" regarding the kickback scheme, Duxbury had "direct and independent knowledge" of the kickback scheme and ruled that the "plain language of [§3730(e)(4)(B)] only requires the relator to provide his information to the government *prior to filing his action*." Pet. 60a. Nevertheless, the district court dismissed Duxbury's kickback scheme claims because, according to the district court, the "Amended Complaint failed to plead the claims with sufficient particularity under Rule 9(b)." Pet. 12a.

On appeal, the First Circuit affirmed the district court's ruling that §3730(e)(4)(B) required Duxbury

to "provide his information to the government prior to filing his action" and *not* "before the public disclosure itself." Pet. 17a. In addition, the First Circuit reversed the district court's dismissal of the claims under Rule 9(b). Pet. 39a.

The First Circuit in affirming the district court's ruling that §3730(e)(4)(B) does not require a relator to provide the information "*prior to the public disclosure*," engaged in an extensive and "careful analysis" of the "original source" exception to the "public disclosure bar" that included a detailed analysis of this Court's decision in *Rockwell*, the structure of the FCA, and the history of the "public disclosure bar." Pet. 16a-30a. The court based its affirmance first and foremost on the "plain and unambiguous" terms of subparagraph B that "only requires the relator to 'provide[ ] the information to the Government *before filing an action* under this section which is based on the information'" and "does not impose any other timing requirement." Pet. 18a. The court therefore, "conclude[d] that the plain terms of §3730(e)(4)(B) begin and end the matter." Pet. 18a.

As a result of Ortho's and the government's claim that relying on the plain and unambiguous language of the statute would lead to "eccentric" results, the First Circuit engaged in an exhaustive analysis of the language and history of the "original source" exception and the "public disclosure bar" and the structure of the FCA to determine if honoring the plain words of the statute would "conflict with the intent of Congress." Pet. 21a. In finding that giving effect to

the plain words of the statute would be consistent with the structure of the FCA and the history of the "original source" exception and the "public disclosure bar," the First Circuit made particular reference to *Rockwell* and the need for "productive private enforcement" of the FCA. Pet. 22a-30a.

The First Circuit noted that *Rockwell* "held that 'information' for purposes of both subparagraphs [A and B] refers to the 'information underlying the allegations of the relator's action' not the information underlying the public disclosure." Pet. 23a. The court pointed out that this important distinction allowed relators "with direct and independent knowledge" of a fraud to "pursue a *qui tam* action under the FCA" where the sources of the "public disclosure" "may fear to come forward." Pet. 24a. The court went on to note that "public disclosure" has the benefit of providing "public pressure on the government to act" in the face of a publicly acknowledged fraud but there were "situations when even that is not enough and the government would benefit from suits brought by relators with substantial information of government fraud even though the outlines of the fraud are in the public domain." Pet. 28a. The court "eschewed reading an exclusion . . . that did not have textual support" and could "discourag[e] productive private enforcement." Pet. 29a. The First Circuit concluded, "the better approach" was "to honor the plain and unambiguous terms of the statute, and hold that §3730(e)(4)(B) only requires that a relator provide

his or her information prior to the filing of the *qui tam* suit." Pet. 30a.

In ruling that Duxbury's kickback claims met the heightened pleading requirements of Rule 9(b) regarding allegations of fraud, the First Circuit specifically found that Duxbury had pleaded with particularity the submission of a representative number of false claims as part of Ortho's alleged nationwide scheme. The First Circuit engaged in a detailed analysis of Duxbury's factual allegations regarding the submission of particular false claims filed by numerous identified medical providers as a result of the alleged kickback scheme. The First Circuit found that Duxbury "set[ ] forth allegations of kickbacks provided by [Ortho] that resulted in the submission of false claims by eight healthcare providers in the Western United States" and that "as to each, Duxbury provides information as to the dates and amounts of the false claims filed by these providers with the Medicare program." Pet. 34a.

The court found, in particular, that Duxbury "alleged the submission of false claims across a large cross-section of providers that alleges the 'who, what, where, and when' of the allegedly false or fraudulent representation": "Duxbury has identified, as to each of the eight medical providers (the who), the illegal kickbacks (the what), the rough time periods and locations (the where and when), and the filing of the false claims themselves." Pet 36a. The court also found that "Duxbury has also alleged facts with respect to the medical providers he identifies that

support his claim that [Ortho] intended to cause the submission of false claims." Pet 36a. In sum, the court found that "Duxbury has alleged facts that false claims were in fact filed by the medical providers he identified, which further supports a strong inference that such claims were also filed nationwide." Pet. 38a. The First Circuit concluded that "the factual evidence alleged here of the submission of false claims caused by [Ortho] at a cross-section of medical providers, is sufficient in this context" and therefore, "Duxbury's allegations pass muster for purposes of Rule 9(b)." Pet. 39a.

REASONS FOR DENYING THE WRIT

I. THERE IS NO ONGOING QUESTION §3730(e)(4)(B) REQUIRES RELATORS TO PROVIDE THEIR INFORMATION *"BEFORE FILING AN ACTION"* AND NOT *"PRIOR TO THE DISCLOSURE"*

There is no ongoing question regarding §3730(e)(4)(B)'s requirement that an "original source" provide their information to the Government *"before filing an action"* and not *"prior to the public disclosure."* Ortho's Petition ignores the fact that whatever confusion existed among the Circuits on this issue was resolved by this Court's decision in *Rockwell International Corp. v. United States*, 549 U.S. 457 (2007). Contrary to the suggestions Ortho makes in its Petition, since *Rockwell*, no Circuit has actually premised a decision on the proposition that

§3730(e)(4)(B), despite its plain words, imposes the additional requirement that the information be provided to the Government *"prior to the public disclosure"* and not just *"before filing an action."*

A. *Rockwell* Removed Any Doubt That §3730(e)(4)(B) "Standing On Its Own Suggests Th[e] Disposition" That Relator Is Required To Provide Their Information *"Before Filing An Action."*

This Court in *Rockwell* removed any doubt that, in cases where there has been a public disclosure of an alleged *qui tam* fraud, §3730(e)(4)(B) by its plain terms, requires relators with "direct and independent knowledge" of the fraud to provide their information to the Government *"before filing an action."* In fact, the Court's recognition in *Rockwell* that the plain words of the statute require a relator in cases where there has been a public disclosure of a *qui tam* fraud to provide the information to the Government *"before filing an action"* was integral to the Court's decision in *Rockwell* denying "original source" status to the plaintiff.

In *Rockwell*, this Court dealt with the "original source" exception (§3730(e)(4)(B)) and its requirement that the relator have "direct and independent knowledge of the *information on which the allegations are based.*" The Court dealt with the question of whether §3730(e)(4)(B)'s "phrase 'information on which the allegations are based'" "refer to the information on

which the *relator's allegations* [in his complaint] are based or the information on which the *publicly disclosed allegations* that triggered the public-disclosure bar are based." Id. at 470. The Court noted that the Circuits "had divided over the issue." Id. at 470 fn5.

The Court held that the "information" to which subparagraph (B) speaks that the relator is required to have "direct and independent knowledge" of in order to qualify for the "original source" exception is the information upon which the relators' complaint allegations are based and not the information underlying the "public disclosure." Id. at 470-471. The foundation for the Court's holding that the "information" referred to in §3730(e)(4)(B) is complaint information and not "public disclosure" information are the plain words of the statute requiring that the "information" be provided to the government *"before filing an action."* The Court ruled "subparagraph B standing on its own suggests th[e] disposition" that the "information" is the information underlying the relator's complaint because the "information one would expect a relator to 'provide to the Government *before filing an action* . . . based on the information' is the information underlying the relator's claims":

> To begin with, subparagraph (B) standing on its own suggests that disposition. The relator must have 'direct and independent knowledge of the information on which the allegations are based,' and he must 'provid[e] the information to the Government *before*

> *filing an action* under this section which is based on the information.' Surely the information one would expect a relator to 'provide to the Government *before filing an action* . . . based on the information' is the information underlying the relator's claims.

Rockwell International Corp. v. United States, 549 U.S. 457, 471 (2007) (emphasis added).

The Court in *Rockwell* further demonstrated that §3730(e)(4)(B)'s plain requirement that the relator provide the information "*before filing an action*" was integral to its decision when the Court went on to hold that the "information" referred to in the "original source" exception (subparagraph B) is the same as the "information" referred to in the "public disclosure bar" (subparagraph A) i.e., complaint as opposed to "public disclosure" information. The Court rejected the reasoning of contrary Circuits that had held that the "public disclosure bar" required relators to be the "original source" of the information underlying the "public disclosure" as opposed to the relator's complaint. Id. at 472. It did so by pointing out that the "information" referred to in subparagraph A – that a relator is required to be the "original source" of – is the information of "the person *bringing the action.*" The Court referred back to its "analysis" of subparagraph B and that section's clear reference to "information" provided to the government "*before filing an action.*" "In light of the analysis" it had set forth regarding subparagraph B's plain requirement to provide "information" "*before filing an action*" coupled

with subparagraph A's reference to "information" possessed by the person "*bringing the action*," it was clear to the Court that the "public disclosure bar" and the "original source" exception are both concerned with the relator's relationship to the information *underlying the action* that the relator was "filing"/"bringing" as opposed to the "public disclosure" triggering the need for the relator to qualify as an "original source" of that information:

> The complete phrase at issue [in §3730(e)(4)(A)] is "unless . . . the person *bringing the action* is an original source of the information." It seems to us more likely (*in light of the analysis set forth above*) that the information in question is the information *underlying the action* referred to a few words earlier, to-wit, *the action* "based upon the public disclosure of allegations or transactions" referred to at the beginning of the provision. On this interpretation, "information" in subparagraph (A) and "information on which the allegations are based" in subparagraph (B) are one and the same, viz., information underlying the allegations of the relator's action.

Rockwell International Corp. v. United States, 549 U.S. 457, 472 (2007) (emphasis added except "*underlying the action*" in the original).

Accordingly, the Court made it clear that its entire rationale for holding that *complaint* as opposed to *public disclosure* information is the information that the "original source" must have "direct and

independent knowledge" of, stems from the statute's command that the information be provided "*before filing an action.*" Any suggestion that the unexpressed terms of the statute also required that the "information" be provided "*prior to the public disclosure*" would completely eviscerate the premise of the Court's holding. Under these circumstances, *Rockwell*'s bedrock reliance on the plain words of the statute that the information be provided "*before filing an action*" makes ineluctable that "subparagraph B standing on its own suggests t[he] disposition" that the relator's information has to be provided "*before filing an action*" and not "*prior to the public disclosure.*"

B. Since *Rockwell*, No Circuit Has Based A Decision On §3730(e)(4)(B) Requiring The Relator To Provide His Information "*Prior To The Public Disclosure.*"

Undercutting the proffered rationale for Ortho's Petition is the fact that since *Rockwell* was decided no Circuit has challenged the Court's ruling that §3730(e)(4)(B) "standing on its own" plainly requires that the relator provide his information to the Government "*before filing an action.*" The two post-*Rockwell* cases cited by Ortho from the Sixth and Ninth Circuits, *U.S. ex rel. Poteet v. Medtronic*, 552 F.3d 503 (6th Cir. 2009) and *U.S. ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195 (9th Cir. 2009), do not provide serviceable precedent for Ortho's assertion that there is an ongoing conflict among the

Circuits. Although the two cases, cited by Ortho from the Sixth and Ninth Circuits that post-date *Rockwell*, do reference earlier contrary precedent from those Circuits imposing additional pre-public disclosure requirements on relators that is not found in the plain words of the statute, neither case relies on that precedent for its decision.

In *Poteet*, the Sixth Circuit affirmed the dismissal of a *qui tam* case under the "public disclosure bar." The *Poteet* court in reviewing the statutory requirements qualifying a relator as an "original source" under §3730(e)(4)(B) referenced the Sixth Circuit precedent that predated *Rockwell*, *U.S. ex rel. McKenzie v. BellSouth Telecommunications, Inc.*, 123 F.3d 935 (6th Cir. 1997), that had held "in addition to the requirement that a relator must have provided information to the government prior to filing her FCA suit a relator must also provide the government with the information upon which the allegations are based prior to any public disclosure." *Poteet, supra* at 28-29. However, the court's decision that relator's "*qui tam* complaint is jurisdictionally barred by the FCA's public disclosure provision" was based on the fact that relator "undisputably failed to provide t[he] information to the government *before filing her complaint*" as well as "before the filing" of a third party's complaint that constituted a "public disclosure" of the alleged *qui tam* fraud. *Poteet, supra* at 29. The relator having failed to provide the Government her information "*before filing her complaint*," the *Poteet* court had no need to reach the issue of

whether the relator also had to provide the information *"prior to any public disclosure."* In addition, although it cited to *Rockwell* in referencing the "original source" exception, the *Poteet* court did not discuss *Rockwell* at all regarding the reporting requirements imposed by the statute.

Similarly, in *Meyer*, the Ninth Circuit affirmed the dismissal of a *qui tam* action under the "public disclosure bar." In reviewing the requirements of establishing "original source" status under §3730(e)(4)(B), the *Meyer* court referenced the Ninth Circuit precedent that predated *Rockwell*, *U.S. ex rel. Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992), in which the Ninth Circuit held that "to be an original source, a relator 'must satisfy an additional requirement under §3730(e)(4)(A) that is not in the statute *in haec verba*,' namely that he 'had a hand in the public disclosure of the allegations that are a part of his suit.'" *Meyer, supra* at 12. The *Meyer* court however did not need to rely on this precedent because it was clear that "relators lacked the requisite direct and independent knowledge of the alleged fraud to qualify as original sources." Id. As in *Poteet*, the *Meyer* court had no need and did not discuss *Rockwell*'s impact on the previous precedent imposing additional pre-disclosure government reporting requirements under the "original source" exception to the "public disclosure bar."

It is clear then that the two post-*Rockwell* cases cited by Ortho in support of its assertion that there is a "split on when a relator must provide information"

to the Government do not constitute serviceable precedent to support its Petition. In point of fact, the First Circuit is the only Circuit to address this issue head-on since *Rockwell* was decided. There is no reason to believe that the other Circuits, once they have had the appropriate opportunity to do so, will not be compelled, as the First Circuit was, by this Court's focus on the plain language of the "original source" exception and the "public disclosure bar," as well as the history of those provisions and the structure of the FCA, to rule §3730(e)(4)(B) should be taken at its word, to-wit, "[t]he relator . . . must 'provid[e] the information to the Government *before filing an action.*" See *Rockwell, supra* at 471 (emphasis added) and *U.S. ex rel. Duxbury v. Ortho Biotech Products, L.P.,* 579 F.3d 13, 21-28 (1st Cir. 2009).

II. THE FIRST CIRCUIT'S 9(b) RULING IS CONSISTENT WITH THE RULINGS OF THE OTHER CIRCUITS REGARDING PLEADING "REPRESENTATIVE EXAMPLES" OF WIDESPREAD FRAUD

In attempting to demonstrate that there is a need for review of the First Circuit's ruling that Duxbury's complaint met the heightened pleading requirements of Rule 9(b), Ortho makes several misleading statements that Duxbury had not identified even one false claim alleged to have resulted

from Ortho's fraudulent nationwide kickback scheme of long duration.[3] This charade was necessary in order to prop up Ortho's contention that the First Circuit applied a less stringent rule that was in conflict with the other Circuits. In point of fact, as the First Circuit's detailed review of Duxbury's allegations makes pellucid, Duxbury "alleged the submission of false claims across a large cross-section of providers that alleges the 'who, what, where, and when' of the allegedly false or fraudulent representation" which "supports a strong inference that such claims were also filed nationwide." Pet. 36a-38a.

With the truth established as to the facts regarding Duxbury's detailed allegations regarding the submission of actual false claims that were a representative cross-section of the nationwide scheme alleged, it is clear that the First Circuit's ruling that Duxbury's complaint passed Rule 9(b) muster is

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[3] Throughout its Petition Ortho makes assertions that misleadingly suggest that Duxbury did not identify any false claims that he alleged were submitted for payment as a result of Ortho's fraudulent kickback scheme: "Questions Presented . . . without identifying a single false or fraudulent claim" (Pet. (i)); "he cannot allege a single specific false claim" (Pet. 20); "for a relator who contends that he lacks the necessary access to specify false claims with particularity" (Pet. 26); "while Duxbury alleged that he was unable to identify 'all of the false claims,' he actually identified none" (Pet. 26 fn4); "He did not plead with particularity any false claims or any false statements or records linked to such claims" (Pet. 30); and, "an FCA plaintiff must allege facts that in some way identify a particular 'false or fraudulent claim.' Duxbury did not do this." (Pet. 33).

completely consistent with the Rule and the standards established by the other Circuits cited by Ortho regarding the pleading requirements for a complex fraudulent scheme of long duration.

Like the First Circuit, the other Circuits cited by Ortho that have considered the issue have held that in "complex" cases alleging a "fraudulent scheme involv[ing] numerous transactions that occurred over a long period of time, the courts have found it impractical to require the plaintiff to plead the specifics with respect to each and every instance of fraudulent conduct." *U.S. ex rel. Bledsoe v. Community Health Systems, Inc.*, 501 F.3d 493, 509-510 (11th Cir. 2007). "The examples that a relator provides will support more generalized allegations of fraud . . . to the extent that the relator's examples are *representative samples* of the broader class of claims." Id. at 510 citing *U.S. ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 557 (8th Cir. 2006) ("Clearly, neither this court nor *Rule 9(b)* requires [a relator] to allege specific details of *every* alleged fraudulent claim forming the basis of [the relator's] complaint. However . . . [the relator] must provide *some* representative examples of [the defendants'] alleged fraudulent conduct, specifying the time, place, and content of their acts and the identity of the actors."), *cert. denied*, 127 S. Ct. 189, 166 L. Ed. 2d 142 (2006). See also, *U.S. ex rel. Clausen v. Laboratory Corporation of America, Inc.*, 290 F.3d 1301, 1314 (11th Cir. 2002) (where "fraud complex" plaintiff has to "allege at least

some examples of actual false claims to lay a complete foundation for the rest of [the] allegations").

It is testimony to the weakness of Ortho's Petition that it has sought to distort the record as to what respondent actually pleaded in order to prop up a contention it believed was more likely to appeal to the Court. As the premise of Ortho's contention is false, i.e., Ortho asserted Duxbury did not allege the submission of any false claims when the truth is he did plead with particularity a representative cross-section of claims evidencing the nationwide scheme, as the First Circuit so found, there is no basis to grant Ortho's Petition regarding the First Circuit's ruling that Duxbury satisfied the heightened pleading requirements of Rule 9(b).

CONCLUSION

The Petition for a writ of certiorari should be denied.

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Respectfully submitted,

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